

REPORT OF RECOMMENDATIONS AND FINDINGS

By the Acupuncturists'
Technical Review Committee

To the Nebraska State Board of Health, the
Director of the Division of Public Health, Department of Health and Human
Services, and the Members of the Health and Human
Services Committee of the Legislature

August 19, 2013

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Part One: Preliminary Information

Introduction

The Credentialing Review Program is a review process advisory to the Legislature which is designed to assess the need for state regulation of health professionals. The credentialing review statute requires that review bodies assess the need for credentialing proposals by examining whether such proposals are in the public interest.

The law directs those health occupations and professions seeking credentialing or a change in scope of practice to submit an application for review to the Department of Health and Human Services, Division of Public Health. The Director of this Division will then appoint an appropriate technical review committee to review the application and make recommendations regarding whether or not the application in question should be approved. These recommendations are made in accordance with statutory criteria contained in Section 71-6221 of the Nebraska Revised Statutes. These criteria focus the attention of committee members on the public health, safety, and welfare.

The recommendations of technical review committees take the form of written reports that are submitted to the State Board of Health and the Director of the Division along with any other materials requested by these review bodies. These two review bodies formulate their own independent reports on credentialing proposals. All reports that are generated by the program are submitted to the Legislature to assist state senators in their review of proposed legislation pertinent to the credentialing of health care professions.

The Acupuncturists' Technical Review Committee Members

Jeromy Warner, Psy.D., L.P., Chairperson Therapist, Mary Lanning Hospital	(Hastings)
Linda Black, B.S.R.T. Retired medical radiographer	(Hildreth)
Dr. Gregory Gaden, Ed. D. Director of Special Education	(La Vista)
Norman Langemach, J.D. Self-employed Attorney	(Lincoln)
Patricia Lopez, R.N. Public Health Nurse Consultant	(Lincoln)
Michael Millea, L.M.H.P. Retired educator	(Lincoln)
Corrinne Pedersen Manager of Member Development at the Nebraska Municipal Power Pool - Lincoln	(Lincoln)

Meetings Held

Orientation and Initial Discussion: March 14, 2013
Discussion two: April 15, 2013
Discussion three: May 6, 2013
Preliminary Recommendation: June 3, 2013
Public Hearing: June 24, 2013
Final Recommendation: July 22, 2013
Final Approval of the Report: August 19, 2013

Part Two: Summary of Committee Recommendations

Committee Action on the Entire Proposal:

The committee members approved an amended version of the applicants' proposal. The amendment in question is described on page six of this report.

Ancillary Recommendations by the Committee Members:

The committee members made the following ancillary recommendations:

- That referral criteria for Licensed Acupuncturists be considered by Nebraska.
- That Licensed Acupuncturists be required to develop and utilize an informed consent intake form for all first-time clients.
- That the rules and regulations for Licensed Acupuncturists be updated, and that a component of any updating process should include the replacement of the examination currently specified in these rules and regulations with the more up-to-date biomedical examination.
- That the continuing education units for Licensed Acupuncturists be reviewed every two years to ensure that they are current and appropriate.
- That the continuing education units of licensed professionals other than Licensed Acupuncturists who are also permitted to provide acupuncture services in Nebraska be reviewed periodically to ensure that they are current and appropriate.

Part Three: Summary of the Applicants' Proposal

Applicant representatives stated that approval of the proposal would have the effect of eliminating the current requirement that a Licensed Acupuncturist must document that each potential new patient has been examined by a physician or an osteopath within ninety days immediately preceding the date of initial treatment by the Licensed Acupuncturist. **(The Application from the Applicant Group, Page 4)**

The proposal was amended to add the following wording:

An item was proposed to be added to standard of care provisions for acupuncturists **(Ne. Rev. Stat. 38-2058)**: This item would state as follows: "An acupuncturist licensed under the Uniform Credentialing Act shall refer a patient to an appropriate practitioner when the problem of the patient is beyond the training, experience, or competence of the acupuncturist."

Part Four: Discussion on the Issues of the Review

How well does the current practice situation meet the needs of Nebraskans?

Arguments against the current practice restrictions on Licensed Acupuncturists include the following:

- 1) The current situation complicates access to the services of Licensed Acupuncturists by requiring that each client must have visited a physician first, if they have not already done so, within the previous 90 days. Some clients do not want to incur the extra cost of such an examination, and choose not to return for their acupuncture care. Low income clients are the ones most vulnerable to the limitations of this regulatory mechanism, many of whom lack health insurance. **(The Transcript of the Public Hearing, Page 19)**
- 2) The ninety-day pre-screening requirement is ineffective as a means of protecting the public. A client examined by a physician nearly three months ago might very well have contracted a serious illness or condition since then. Under this scenario the acupuncturist could treat this client without feeling compelled to consider whether this client has an undiagnosed illness, since the client has already been examined by a physician within the 90-day limit. Also, the ninety-day pre-screening requirement is potentially a source of harm to those clients who choose not to get examined by a physician, as referred. In this scenario the client would receive no examination or treatment from any practitioner. **(The Transcript of the Public Hearing, Page 12)**
- 3) Community acupuncture is impossible under the current practice situation because this approach to acupuncture involves the provision of services to anyone who wants it, 'off-the-street', no questions asked. **(The Minutes of the Second Meeting, Held on April 15, 2013)**
- 4) Documented instances of harm from the services of Licensed Acupuncturists are very low, and malpractice rates for this profession are amongst the lowest of all regulated health professions. **(The Minutes of the First Meeting, Held on March 14, 2013)**
- 5) Recent acupuncture graduates are required to pass all of the testing modules to become NCCAOM certified, but can fail as many as two of these testing modules and still become licensed in Nebraska. This situation needs to be rectified. **(The Minutes of the Second Meeting, Held on April 15, 2013)**
- 6) Safety measures are not being effectively addressed because professionals, other than Licensed Acupuncturists, are allowed to provide acupuncture services with much less education and training than are Licensed Acupuncturists. **(The Minutes of the Second Meeting, Held on April 15, 2013)**

Arguments in favor of keeping the current practice restrictions on Licensed Acupuncturists include the following:

- 1) The current situation provides protection for Nebraskans who might have an undiagnosed condition or illness. Concern was raised regarding the extent to which acupuncturists are educated and trained in diagnosing a client's overall health condition. The applicants responded that they take a course in 'western medicine' which covers western style medical diagnostic procedures. **(The Biomedicine Expanded Content Outline, Effective January 1, 2013)**
- 2) The applicant group stated that as yet they have no standardized set of questions that they ask to assess a client's overall health condition, and that each practitioner handles these matters in accordance with their own judgment. **(The Minutes of the Third Meeting, Held on May 6, 2013)**
- 3) The committee members were informed by the applicants that their continuing education does provide referral-related procedures, but that such training is not required for re-licensure. **(The Minutes of the Third Meeting, Held on May 6, 2013)**
- 4) One committee member commented that the current pre-screening requirement delays, but does not prevent, access to the services of Licensed Acupuncturists, and that applicant group arguments about restrictions on access to their services are exaggerated. **(The Minutes of the Fourth Meeting, Held on June 3, 2013)**

Access to care implications of the proposal

The applicants argued that access to their acupuncture services would be improved by the proposal in the following ways:

- 1) The costs of acupuncture services would be reduced by eliminating the pre-screening requirement. **(The Minutes of the First Meeting, Held on March 14, 2013)**
- 2) The convenience of acupuncture services would improve by eliminating the pre-screening requirement, enabling patients to access these services directly without first having to see other health professionals. **(The Minutes of the First Meeting, Held on March 14, 2013)**
- 3) Access to acupuncture services in rural areas would be improved by the proposal because more acupuncturists would be willing to establish practices in Nebraska. **(The Minutes of the First Meeting, Held on March 14, 2013)**
- 4) Community acupuncture, in which anyone who wants it receives it, would now be possible in Nebraska. Current restrictions make this kind of service impossible. **(The Minutes of the Second Meeting, Held on April 15, 2013)**

Those with concerns about the proposal made the following arguments regarding the issue of access to acupuncture services:

- 1) Comment was made that the current pre-screening requirement delays, but does not prevent, access to the services of Licensed Acupuncturists, and that applicant group arguments about the seriousness of these restrictions on access to their care are exaggerated. (**The Minutes of the Fourth Meeting, Held on June 3, 2013**)
- 2) Comment was made that persons who seek acupuncture services can always get direct access to the acupuncture services of physicians and chiropractors if they are willing to seek out practitioners other than Licensed Acupuncturists. (**The Transcript of the Public Hearing, Pages 13 and 14**)

Safety implications of the proposal

Applicant group arguments and comments:

- 1) Licensed Acupuncturists practice safely and effectively and are able to make appropriate referrals based on their own education and training, making the current statutory requirement unnecessary. (**The Minutes of the First Meeting, Held on March 14, 2013, and The Biomedicine Expanded Content Outline, Effective January 1, 2013**)
- 2) Licensed Acupuncturists inform new clients about their services and the legal restrictions imposed on these services. (**The Minutes of the Second Meeting, Held on April 15, 2013, and Consent to Treatment by Donna Huber, Thirteen Moons Acupuncture**)

Comments by those with concerns about the proposal:

- 1) The new wording added to the amended version of the proposal which would require referral to other licensed practitioners by Licensed Acupuncturists is not adequate to address concerns about public safety because it lacks sufficient technical detail and enforceability. (**The Minutes of the Fourth Meeting, Held on June 3, 2013**)
- 2) Clear and consistent standards regarding how Licensed Acupuncturists currently make referrals to other practitioners have not been defined by the applicant group, and the amendment added to the proposal during the review did not accomplish this. Concern was expressed about the extent to which such procedures by Licensed Acupuncturists can protect the public. (**The Minutes of the Fourth Meeting, Held on June 3, 2013**)

The education and training of Licensed Acupuncturists

Applicant group arguments and comments:

- 1) The applicants stated that they are trained by a special course in 'western' medical referrals but that they are not allowed to diagnose or treat conditions treated by 'western' medicine. **(The Minutes of the First Meeting, Held on March 14, 2013, and, The Biomedicine Expanded Content Outline, Effective January 1, 2013)**
- 2) The program for Licensed Acupuncturists is a 3,000 hour, 4-year Master's Degree. To become licensed in Nebraska, they must pass a 'clean needle' technique test as well as a national board exam. They must have 50 hours of continuing education every two years to maintain their license. They also carry their own malpractice insurance. **(The Minutes of the First Meeting, Held on March 14, 2013, and The Application from the Applicant Group, Page 7)**
- 3) The applicants stated that they are educated and trained under the tenets of what is known as 'oriental medicine', which unlike 'western' medicine it is not based on the germ theory of disease. They do refer out based on assessments taught to them in Chinese medicine. The applicants stated that their referral method is symptoms-based, and that if a client has chest pains, cramping, or bleeding, for example, they are referred to their family physician. **(The Minutes of the Second Meeting, Held on April 15, 2013, and The Application from the Applicant Group, Page 7)**

Concerns expressed about the proposal:

- 1) The committee members were informed that they are not trained to diagnose or treat the kinds of conditions or diseases typically treated by 'western' medicine. **(The Minutes of the Second Meeting, Held on April 15, 2013)**
- 2) The committee members were informed that continuing education for Licensed Acupuncturists does include referral-related procedures, but that this training is not required for re-licensure. **(The Minutes of the Third Meeting, Held on May 6, 2013)**
- 3) The committee members were informed that there are no measures in Licensed Acupuncture to assess whether practitioners are competently performing particular skill sets or services other than the disciplinary processes associated with the enforcement of their licensure statute by the State of Nebraska. **(The Minutes of the Third Meeting, Held on May 6, 2013)**

Alternative means of addressing safety concerns

General comments and observations:

- 1) Removing the current pre-screening requirement without replacing it with an alternative would leave the public with no protection at all. (**The Minutes of the Second Meeting, Held on April 15, 2013**)
- 2) Chiropractors are educated and trained to screen and diagnose a patient's overall health condition, and if the current restriction of licensed acupuncture scope of practice is maintained, it could be argued that chiropractors should be added to the list of practitioners to whom patients of licensed acupuncturists could be referred. Many chiropractors take a 100-clock hour course to learn acupuncture, although there is also a 300-clock hour course. (**The Minutes of the Second Meeting, Held on April 15, 2013, and The Transcript of the Public Hearing, Page 34**)

Ideas discussed for alternatives to the current proposal included:

- 1) Developing symptom-based protocols as guidelines to help Licensed Acupuncturists make appropriate referrals. The committee members were informed that Minnesota has implemented this approach. (**The Minutes of the Second Meeting, Held on April 15, 2013**)
- 2) Replacing the current wording in the rules and regulations for Licensed Acupuncturists pertinent to the examination requirement with wording that includes the more up-to-date biomedical examination which tests practitioners in recognizing and referring serious illnesses. (**The Minutes of the First Meeting, Held on March 14, 2013**)
- 3) Adopting the concept of 'informed consent' to deal with concerns about the health condition of acupuncture clients. (**The Minutes of the First Meeting, Held on March 14, 2013**)
- 4) Additional ideas from other states include, but are not limited to, the following:
 - South Carolina defines misconduct rules for Licensed Acupuncturists.
 - Texas has a rule whereby after a specified period of time if acupuncture treatment has not been successful the patient must be referred to another type of health care provider.
 - Washington has a consultation requirement, along with a waiver provision, which waives the Licensed Acupuncturist of liability if the patient refuses a referral to another provider. (**The Minutes of the Fourth Meeting, Held on June 3, 2013**)

Part Five: Committee Recommendations

Committee Actions on the Six Scope of Practice Criteria:

The committee members took action on each criterion by voting on whether the proposal satisfies the criterion or not. Committee actions on each criterion were as follows:

Criterion one: The health, safety, and welfare of the public are inadequately addressed by the present scope of practice or limitations on the scope of practice.

Voting yes were Black, Lopez, Pedersen, and Gaden. Voting no were Langemach and Millea. Dr. Warner did not vote. The motion passed. Committee comments were as follows:

- There should be an 'even playing field' for all who provide acupuncture services.
- Let the consumer exercise their own choice of acupuncture provider unfettered by barriers to service.
- Informed consent should be the basis of consumer choice of an acupuncturist.
- There is no compelling evidence that the current situation does not adequately protect the public health, safety, and welfare.

Criterion two: Enactment of the proposed change in scope of practice would benefit the health, safety, or welfare of the public.

Voting yes were Black, Lopez, Pedersen, Langemach, and Gaden. Voting no was Millea. Dr. Warner did not vote. The motion passed. Committee comments were as follows:

- Under the current situation patients might end up going to no practitioner at all for their health problems.
- Community acupuncture is impossible under the current situation.
- Freedom of choice is the principal benefit of this proposal.
- We need to go to a consumer-friendly informed consent model as opposed to one that imposes barriers to free choice.
- The profession was licensed to ensure protection of the public, and we need to have confidence that this licensure suffices to protect the public without creating additional barriers to their services. No profession should be another profession's 'gatekeeper'.
- There is no compelling evidence of a benefit to the public from the proposal.

Criterion three: The proposed change in scope of practice does not create a significant new danger to the health, safety, or welfare of the public.

Voting yes were Black, Lopez, Pedersen, Langemach, Gaden, and Millea. Dr. Warner did not vote. The motion passed. Committee comments were as follows:

- The current licensure law should protect the public from harm, but the state needs to monitor those who provide these services.
- There was no compelling argument that harm will result from this proposal.

Criterion four: The current education and training for the health profession adequately prepares practitioners to perform the new skill or service.

Voting yes were Black, Lopez, Pedersen, Langemach, Gaden, and Millea. Dr. Warner did not vote. The motion passed. Committee comments were as follows:

- The curriculum is appropriate for what is being requested, and the biomedical examination is an impressive component of the training process.
- Licensed Acupuncture education and training is far more stringent than that for chiropractic, for example.

Criterion five: There are appropriate post-professional programs and competence assessment measures available to assure that the practitioner is competent to perform the new skill of service in a safe manner.

Voting yes were Black, Lopez, Pedersen, Langemach, Gaden, and Millea. Dr. Warner did not vote. The motion passed. Committee comments were as follows:

- Their continuing education component and national certification model are impressive.
- The state should review medical and chiropractic acupuncture continuing education to ensure they are current and appropriate.

Criterion six: There are adequate measures to assess whether practitioners are competently performing the new skill or service and to take appropriate action if they are not performing competently.

Voting yes were Black, Lopez, Pedersen, Langemach, Gaden, and Millea. Dr. Warner did not vote. The motion passed. Committee comments were as follows:

- The applicants are already referring out to physicians, and this seems to work acceptably.
- It's the duty of the state to enforce the licensure statute. This should suffice to protect the public.
- There is a need to update the rules and regulations for Licensed Acupuncturists and insert language replacing the old examination with the new biomedical examination.

Committee Action on the Entire Proposal:

The committee members took action on the entire proposal after completing their actions on the six criteria.

Action taken: A majority of the committee members voted to recommend that the proposal, as amended, be approved by the legislature.

Voting yes were Black, Lopez, Pedersen, Langemach, and Gaden. Voting no was Millea. Dr. Warner did not vote. The motion passed.

Committee comments were as follows:

- Most committee members indicated that they were comfortable with the current version of the proposal.
- One member indicated that he has ongoing concerns with any health profession that is not based on 'western science'.

Ancillary Recommendations by the Committee Members:

It was moved and seconded that Nebraska consider adopting referral criteria for Licensed Acupuncturists that are currently used by the State of Minnesota. The motion passed.

It was moved and seconded that Licensed Acupuncturists be required to develop and utilize an informed consent intake form for all first time clients, as is now done in the State of Minnesota. The motion passed.

It was moved and seconded that the rules and regulations for Licensed Acupuncturists be updated, and that such an updating process should include the replacement of the examination currently specified in these rules and regulations with the more up-to-date biomedical examination. The motion passed.

It was moved and seconded that the continuing education units for Licensed Acupuncturists be reviewed every two years to ensure that they are current and appropriate. The motion passed.

It was moved and seconded that the continuing education units of licensed professionals other than Licensed Acupuncturists who also provide acupuncture services be reviewed periodically to ensure that they are current and appropriate. The motion passed.